

J. Thomas



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Cornerstone Company--Reconsideration

File: B-261251.2

Date: August 10, 1995

DECISION

The Cornerstone Company requests reconsideration of our May 8, 1995 dismissal of its protest of the rejection of its bid and the award of a contract to another company under invitation for bids No. DAAD01-95-B-0209, a small disadvantaged business (SDB) set-aside. We dismissed the protest because we viewed it as an untimely challenge to the set-aside. (Cornerstone is not an SDB and its bid was rejected because it did not certify itself as an SDB.)

Cornerstone maintains that its protest was not that the procurement had been set aside, but that the agency did not include the appropriate clauses in the solicitation or follow the applicable regulations. Cornerstone states that it did not know of the regulatory violation until after bid opening and the award announcement and did not know that the appropriate clause was not in the solicitation until it received certain information from the contracting officer after the protest was filed.

Cornerstone originally protested that the agency violated regulations prohibiting:

- 1) an SDB set-aside for construction contracts under 2 million dollars, and,
- 2) award at a price exceeding 110 percent of the fair market price. Cornerstone asserted that while it was obvious from the solicitation that the procurement was an SDB set-aside, it was only apparent after the government estimate of \$1.4 million was announced at bid opening and after the award price was announced that "there is no way the contracting officer could have had a 'reasonable expectation' at the time the solicitation was issued that these regulatory requirements would be met."

Cornerstone obviously based its challenge on alleged regulatory violations; however, the challenge clearly was to the set-aside itself, and we do not share Cornerstone's view that under the circumstances here it could wait until after award to protest. Although Cornerstone may not have known the precise government estimate, it had to have known the approximate value of the procurement prior to bid opening. Indeed, Cornerstone asserts that its low bid (of \$953,052.60) represents the fair market price for this procurement. Accordingly, we think Cornerstone's first basis for protest clearly should have been apparent to Cornerstone after it reviewed the

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specifications and it therefore should have protested the set-aside prior to bid opening.¹

We did not explicitly discuss the fair market price argument because we did not view it as raising a valid basis for protest. First, the fact that an award price allegedly exceeds the fair market price by more than 10 percent does not itself establish that the contracting officer did not have a reasonable expectation of receiving bids at appropriate prices. More importantly, Cornerstone simply asserted that its low bid price represented the fair market price and that the award price (\$1,057,650) "was significantly more than 10 percent above" that price. A fair market price, however, is not necessarily tied to the low bid price received from an ineligible bidder, see generally Vitronics, Inc., 69 Comp. Gen., 170 (1990), 90-1 CPD ¶ 57; Canadian Commercial Corp., B-196111, May 29, 1980, 80-1 CPD ¶ 369, nor is it based on the lowest possible cost. Federal Acquisition Regulation (FAR) § 19.001; see generally Battery Assemblers, Inc., B-260043, May 23, 1995, 95-1 CPD ¶ 254; compare Godot Enters., Inc., B-255200, Feb. 16, 1994, 94-1 CPD ¶ 116 (SDB set-aside properly withdrawn where SDB bid was 29 percent higher than non-SDB bid and substantially higher than revised government estimate). In this regard, a fair market price may be determined by a variety of techniques, including comparison with the government estimate. FAR §§ 19.202-b(a), 15.805-2. The award price here was barely 11 percent above the low bid price and was well within the government estimate. Thus, Cornerstone's allegation, without more, was simply insufficient to set forth a valid basis for protest.

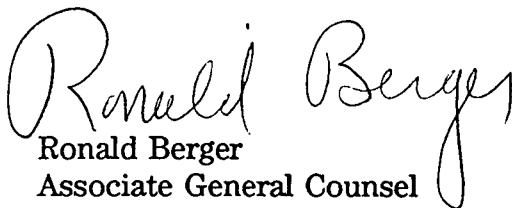
In its reconsideration request Cornerstone refers to another regulatory violation of which it was allegedly unaware until after it filed its protest. Cornerstone's letter raising that particular issue was dated May 8, the date of our dismissal, and was not received until May 9. Accordingly, it played no role in the dismissal.

Moreover, the May 8 letter also did not raise a valid basis for protest. The protester asserted that the agency violated FAR § 19.1007 because the solicitation did not include the clause found at FAR § 52.219-19, "Small Business Concern Representation for the Small Business Competiveness Demonstration Program." This clause is required in solicitations involving the four designated industry groups which, under the Demonstration Program, are generally not subject to small business set-asides. FAR §§ 19.1005, 19.1006. It is not at all clear, however, that this clause is intended to be included in solicitations issued pursuant to the Department of Defense (DOD) set-aside program since that program is exempt from the Demonstration Program. All Star Maint., Inc., B-249810.3, Nov. 24, 1992, 92-2 CPD ¶ 374; see 15 U.S.C. § 644 note (1994). In any event, we fail to see how

¹We also point out that this aspect of the protest would appear to be without merit because the regulatory prohibition allegedly violated was not applicable here. See Defense Federal Acquisition Regulation Supplement § 219.1006(b)(1)(A).

the absence of the clause was prejudicial to Cornerstone. Cornerstone asserted that had the clause been included in the solicitation, it "would have had notice that this solicitation was issued under . . . [the] Demonstration Program, and would not have . . . bid." Cornerstone admitted, however, that the solicitation explicitly stated that it was set aside for SDBs, and this was sufficient to place Cornerstone on notice that the agency intended an SDB set-aside.² See South Gulf, Inc., B-260521.2; B-260521.3, May 1, 1995, 95-1 CPD ¶ 225. (It is also not clear what Cornerstone means about having notice that the solicitation was issued "under" the Demonstration Program since, as indicated, DOD's SDB set-asides are exempt from the Program and therefore are properly issued notwithstanding the Program.)

The request for reconsideration is denied.


Ronald Berger
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²As stated above, Cornerstone is not an SDB.